SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 771

BRITISH-AMERICAN OIL PRODUCING COMPANY,
Petitioner,

vs.

D. M. BUFFINGTON AND C. R. SMITH,
Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the United States Circuit Court of Appeals, for the Fifth Circuit, styled British-American Oil Producing Company, et al., Appellants, vs. D. M. Buffington, et al., Appellees, is not yet reported in the Federal Reports, but may be found in the record filed in this suit (R. 396).

II.

Jurisdiction.

This has been stated under subdivision II in the preceding Petition for Writ of Certiorari, to which reference is here made, and, therefore, will not be repeated here.

III.

Statement of the Case.

This has already been stated in the preceding Petition for Writ of Certiorari, under "I", which is hereby adopted and made a part of this brief.

IV.

Specification of Errors.

1. The Circuit Court of Appeals erred in holding that the contract in question was sufficiently definite and certain to support an action for damages.

2. The Circuit Court of Appeals erred in holding that the alleged option contract could be and was made certain by proof outside of the contract by a method not pointed out by its terms.

3. The Circuit Court of Appeals erred in holding that plaintiffs, Buffington and Smith, were ready, able and willing to drill the nineteen wells for which a recovery was allowed, but were prevented from doing so by defendant, British-American Oil Producing Company.

4. The Circuit Court of Appeals erred in holding that the option was separable as to each well and that a rejection of the option when the plaintiffs were requested by the defendant to submit a bid for drilling all the wells was not a breach of the contract.

5. The Circuit Court of Appeals erred in holding that the plaintiffs could recover damages for the second, third, fourth and fifth wells drilled by the defendant.

6. The Circuit Court of Appeals erred in holding that the prevailing contract price was other than $2.00 per foot, which was the price at which the wells were contracted by the defendant.

7. The Circuit Court of Appeals erred in holding that the plaintiffs, Buffington and Smith, should profit over and above their associates, including British-American, by the venture, and that if they had drilled the nineteen wells they would have profited to the extent of the damages awarded them.

8. The Circuit Court of Appeals erred in holding that the alleged option was either a covenant running with the leases, a profit *a prendre*, or equitable servitude and was personally binding on the defendant.

9. The Circuit Court of Appeals erred in holding that the plaintiffs could sue the defendant as a partner on a partnership obligation without an accounting between the parties.

10. The Circuit Court of Appeals erred in holding that it was not the duty of the plaintiffs to make a full disclosure and accounting for the profits made by them in other drilling operations carried on by them while the defendant was developing the lease in question.

V.

ARGUMENT.

Summary of Argument.

Point A. Plaintiff Buffington testified that he construed the contract to mean that such details as the kind of derrick erected and who was to erect it, the size of the hole, who should determine when the casing should be set and who would furnish the water for the drilling, would have to be mutually agreed on by the parties (R. 178-9). Under the authorities an agreement which leaves the essential details of the subject matter to a future agreement between the parties is not a contract sufficiently definite and certain to

be enforced. Moreover, no standard was set in the contract by which the prevailing price was to be determined and the testimony of plaintiff Buffington himself that there were two ways of determining the contract price, one being a matter of favoritism and the other by competitive bidding, was undisputed. The contract does not point out which of these methods was to be followed and is, therefore, indefinite and uncertain.

Point B. It is a fundamental rule that extraneous evidence may be resorted to in order to make certain a contract, but *the contract itself must furnish the key for identification. Volume 10, Texas Jurisprudence* 176, Sec. 102, and *Volume 35, Corpus Juris,* page 1009, Sec. 123. This the contract does not do.

Point C. When the defendant, British-American, decided to drill all the remaining wells on the lease with rotary machines, on account of the high gas pressure in the area and the necessity for haste, they wired plaintiffs, on August 31st, 1938, as follows:

> "WE PLAN TO DRILL REMAINDER OF WELLS ON OUR RECENTLY PURCHASED PAYTON LEASE IN PECOS COUNTY USING PORTABLE ROTARY OUTFIT STOP PLEASE SUBMIT YOUR BID IMMEDIATELY COVERING THE DRILLING OF THESE WELLS WITH THIS TYPE EQUIPMENT" (R. 157).

and the plaintiffs answered, the next day, as follows:

> "OUR DRILLING AGREEMENT DOES NOT REQUIRE US TO USE PORTABLE ROTARY MACHINE STOP WE ARE READY TO BEGIN THE DRILLING OF A WELL ON SUITABLE LOCATION ON OUR LEASE AT PREVAILING PRICE IN ACCORDANCE WITH OUR CONTRACT" (R. 158).

This was a rejection of the option, if any, and such a rejection could not be revived by tendering acceptance. *Minne-*

apolis & St. Louis Ry. Co. v. *Columbus Rolling Mill Co.*, 119 U. S. 149. We quote from said case:

> "A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it."

Point D. In declining to use a rotary machine in the drilling of all the wells when the opportunity was tendered to them, as set out in the above telegram, the plaintiffs rejected the option in its entirety. Immediately thereafter the defendant British-American let a contract for the drilling of the first five wells. They were operating under an assignment of a lease contract requiring continuous drilling and, therefore, could not postpone action pending litigation or in the hope that the plaintiffs might recede from their position (see testimony of A. J. Gibson, R. 252). The defendant, therefore, changed its position so far as the five wells were concerned, acting on the faith of the rejection on the part of the plaintiffs. The majority of the Circuit Court of Appeals should not have charged the defendant with any damages by reason of the drilling of these five wells. The court had no right to limit this rejection by the plaintiffs to the first well drilled. If the plaintiffs defaulted in their obligation so far as the first well was concerned, that default applied to the first five wells and, in no event, did the court have the right to allow damages so far as any of these five wells were concerned. Buffington admitted that he and his associate were not in a position to drill the first well with a rotary drilling machine and his telegram shows that he denied the right of British-American to designate rotary equipment for future drilling. Upon receipt of this telegram, British-American awarded a contract at $2.00

per foot, rotary drilling, for the first five wells which it caused to be drilled. A feverish campaign was on in the field. No doubt British-American felt it could make a more advantageous contract on five wells than it could on one. After British-American had contracted the first five wells, Buffington and Smith could not change their minds about rotary equipment and require British-American to breach its contract made for the drilling of the five wells. A separate contract for each well was not necessary. There is certainly nothing in the contractual stipulation that would support such conclusion.

Point E. The undisputed testimony of plaintiff Buffington was that there were two ways of determining the prevailing contract price, one being a matter of favoritism and the other being by competitive bidding (R. 207-8). When the defendant, British-American, obtained contracts for the drilling of all the wells at $2.00 per foot that price cannot be held to have been obtained other than by competitive bidding, and the plaintiffs should be held to the same in determining the damages, if any.

Point F. A partner or a joint adventurer cannot make a profit while he is acting on behalf of his associates unless it clearly appears that such was the intention and this applies, also, to tenants in common in the operation of their joint lease. There is nothing in the contract that indicates that it was the intention of the parties that such profits should be made. The contrary is indicated by the language of the alleged contract, which provides that no overhead was to be charged by either party in the handling of the joint venture.

Point G. There is no evidence that British-American assumed the contractual obligation, if obligation it was. While, in the assignment from Buffington and Smith to Hamm and Gibson of a one-sixteenth interest, assignors reserved their rights under said stipulation, no such pro-

vision appears in the assignment from Hamm and Gibson or from Dorr to British-American. But even if there had been such reservation, it is respectfully submitted that under the Texas decisions British-American is not personally liable. It has been consistently held by the Texas courts that where one purchases real property burdened with a lien or encumbrance, such purchaser does not become liable therefor in the absence of an assumption of such obligation. In other words, the Texas courts recognize a clear distinction between the assumption of the obligation and taking the property subject to the obligation. *Kynard et al.* v. *Tucker*, 171 S. W. 1086, 211 S. W. 309; *McNeill* v. *Cage et al.*, 85 S. W. 57; *Martin* v. *Rutherford et al.*, 153 S. W. 156.

Point H. The provision in the contract giving the preference in all future drilling operations was a personal covenant of the defendant's assignor, J. J. Dorr, and not one running with the land; therefore not binding on the assignee, British-American Oil Producing Company. See *G. C. & S. F. Ry. Co.* v. *Smith*, 72 Tex. 122, 9 S. W. 865, following and citing the rule in *Spencer's Case*, 4 Coke 16, 1 Smith's Leading Cases, 9th Am. Ed. 174.

Point I. The option for the drilling was not a profit *a prendre* for it did not confer the right to take a part of the soil or produce of the land. *19 Corpus Juris*, page 870.

Point J. The principles governing landlord and tenant do not apply, since this was an "unless" oil and gas lease and not a "drill or pay" lease. Under an "unless" oil and gas lease it is held in Texas that the assignee does not assume the obligation either to drill or to pay. Such a lease creates a determinable fee. *Ehlinger et al.* v. *Clark*, 117 Tex. 547, 8 S. W. (2d) 666, and *Gordon* v. *Empire Gas & Fuel Co.*, 63 F. (2d) 487.

Point K. It is a rule of almost universal application that an action *ex contractu*, as distinguished from an action in

equity, is not maintainable between the partners with respect to partnership transactions unless there has been an accounting, or settlement, of partnership affairs. This rule is recognized and enforced in Texas. *Martin* v. *McBryde*, 21 A. L. R., page 12 and annotations; *Pugh* v. *Newbern*, 58 A. L. R. 617; *Meriweather* v. *Hardeman*, 51 Tex. 436, and *33 Texas Jurisprudence*, page 458, Sec. 149.

Point L. It was undisputed that the plaintiffs engaged in other drilling operations while the drilling program was being carried on on their joint lease by the British-American Oil Producing Company. The duty rested on the plaintiffs to minimize their damages. Of course, if they were fully occupied in the drilling of other wells, they could not have their damages and their profits from the other operations with their drilling tools. These profits were peculiarly within the knowledge of the plaintiffs and, therefore, the burden of proof was upon them to disclose how much these profits were, so that the same could be offset against the damages sought to be recovered. *Selmer, Rome & Dalton Ry. Co.* v. *U. S.*, 139 U. S., 35 L. Ed. 266; *U. S.* v. *D. & G. R. Ry. Co.*, 189 U. S. 84, and *Russman* v. *Blunt*, 104 F. (2d) 877.

Argument in Support of Points A and B.

The optional provision of the letter agreement upon which the suit is based is as follows:

> "It is further understood and agreed that in the event said well is a producer, we are to have the preference of all future drilling operations, at the prevailing contract price" (R. 138).

The uncertainties of the contract are shown by the fact that at the very beginning the parties were not able to agree on what it meant. After the telegram sent by British-American on August 31st, 1938 to plaintiffs, offering the plaintiffs the opportunity to drill the remainder of the wells, which

was rejected by them because of the requirement for rotary drilling (see telegram, R. 158), plaintiff Buffington had a conversation with C. E. Wright, representing British-American, about the drilling and in regard to the term "prevailing contract price". We quote:

> "Q. * * * The prevailing contract price, you construed that to mean, I believe you testified that in your conversation with Mr. Wright when he was down there, I think you said after the telegram was given, I believe you stated that you told him you considered that you were willing to drill at the prevailing contract price?
>
> A. That is right.
>
> Q. But that you did not know how you were going to determine that. I think you stated that in your telegram?
>
> A. That is right.
>
> Q. And that is all the answer you ever would make to them as to what you would drill the wells for, wasn't it?
>
> A. No, that we would not submit a competitive bid.
>
> Q. But you never have from that day to this told them how much you would drill them for?
>
> A. No, that we would drill them at the prevailing contract price" (*R., p. 163*).

Thus, it will be seen that the plaintiff himself was at sea as to what the contract meant, in fact in Plaintiffs' reply of date September 1st, 1938, they raised three questions, (a) that they were not required to bid on the work, (b) the locations had to be suitable and (c) the contract price had to be the prevailing one. The majority of the Circuit Court of Appeals relied on the fact that there had been no difficulty whatever experienced between Dorr, Gibson, Hamm and the plaintiffs before the assignment was made by them to British-American, but they overlooked the fact that before each of the said wells were drilled those parties got to-

gether in each instance and agreed upon the terms and provisions. Plaintiff Buffington testified:

> "Whenever we decided to drill a well we would all get together, the entire partnership, consisting of five of us, talked over the location and talked the matter over regarding prices in the district and came to the agreement. The price was around $2.50 a foot, and that was agreeable to all parties to the partnership" *(R., p. 144).*

The testimony of Buffington shows that he expected that from time to time the parties were to get together and agree upon the terms of a contract, but such an agreement is no contract.

> *"An agreement to enter into negotiations and agree upon the terms of a contract, if they can, cannot be made the basis of a cause of action." Radford* v. *McNeny 104 S. W. (2d) 472* (Tex. Com. App.).

The majority of the Circuit Court of Appeals were of the opinion that the contract could be made certain by extraneous evidence. That is ordinarily true, but *the contract itself must furnish the key for identification.* See *Vol. 10, Texas Jurisprudence,* page 176, Sec. 102, as follows:

> "That is certain which can be made certain; and it is sufficient if the subject matter can be identified, provided *that the contract itself furnishes the key* to identification, or if matters as to which the contract is uncertain may be rendered certain by a mere mathematical calculation, or by a consideration of the language used and all of the attending facts and circumstances."

See, also, *Volume 35, Corpus Juris,* page 1009, Sec. 123, as follows:

> "A contract need not presently fix all the terms of the new lease; it may furnish a certain and definite

> method for their ascertainment and determination in the future. On the other hand, if terms are left for future ascertainment and no method is provided by which they are to be determined, the contract is void for uncertainty."

See, also, *Strait* v. *Fay*, 82 N. E. 648 (Illinois); *Gaston* v. *Sigmund*, 29 Md. 334; *Haskell Motor Co.* v. *Remington*, 25 S. W. (2d) 913, (Tex. Com. App.); *Texas Employers' Ins. Assn.* v. *Moore*, (Tex. Com. App.), 56 S. W. (2d) 653; *Brooks* v. *Federal Surety Company*, 24 Fed. (2d) 884, and *Keating* v. *Michael*, 242 S. W. 563 (Arkansas).

Argument in Support of Points C and D.

The Circuit Court of Appeals, while conceding that the plaintiffs, by rejecting the offer to drill when tendered to them on August 31, 1938, rejected their right to profits that they might have made on the first well, held that the contract was separable and that their rights under the contract were reinstated when they told C. E. Wright, representing British-American, that they were willing to drill at the prevailing contract price. That argument is fatally defective for three reasons: (a) The repudiation of the essential portion of the contract when performance was due was a repudiation in toto. (b) British-American changed its position in reliance on plaintiffs' repudiation of the obligation to drill. The subsequent tender was not sufficient to renew and reinstate. (c) The general statement made by them that they were willing to drill at the prevailing contract price, in connection with their testimony to the effect that they expected to get together with the parties and agree on the details, did not make the contract any more definite than it had been before. The principles we rely on here are especially applicable to an option contract.

It will be kept in mind that the most that can be claimed for the provision in question is that it was an option. On

the plainest principles of equity and whatever may be their rights as to the last wells contracted, Buffington & Smith are precluded from recovering any lost profit on the five wells drilled by the McCutchen Drilling Company contracted on the refusal of Buffington & Smith to recognize the right of British-American to use rotary equipment.

> "A proposal to accept, or an acceptance, upon terms varying from those offered, is a rejection of the offer, and puts an end to the negotiation, unless the party who made the original offer renews it, or assents to the modification suggested. The other party, having once rejected the offer, cannot afterwards revive it by tendering an acceptance of it." *Minneapolis & St. Louis Ry. Co.* v. *Columbus Rolling Mill Company,* 119 U. S. 149.

We quote from *Volume 10, Texas Jurisprudence,* page 450, Sec. 261, as follows:

> "When one party repudiates his agreement or declines to perform it at the time when performance on his part is due, this is in itself a breach of the contract which discharges the other party and gives him a cause of action without any affirmative action on his part."

We know of no rule which gives the plaintiff the right to sue on a contract and enforce it after he has repudiated one of the material provisions thereof, especially until he purges himself of his renunciation. We quote from *Volume 10, Texas Jurisprudence,* page 384, Sec. 217:

> "A breach in toto is not essential, a partial breach being sufficient if it be in respect to a material part, or a part which is so essential to the residue that it cannot be supposed that the party not in default would have made the contract without it, or where it evidences an intention by the party in default to rescind or abandon the contract."

There is another well-established principle of law which also defeats plaintiffs' right to recover, and that is the following, which is set out in *Restatement of the Law on Contracts*, page 484, Sec. 323:

> "(1) Where a party to a contract materially changes his position in reasonable reliance on the other party's (a) manifestations of unjustified lack either of intention or of ability, or (b) apparent inability without justification to perform a condition or a promise for an agreed exchange, a subsequent tender of correct performance by the latter party is inoperative to prevent the occurrence of a breach of contract by him at the time when performance becomes due."

The utmost that can be claimed for the provision in question is that it created some character of optional right. As to such agreements and the duty resting upon an optionee, the law is concisely stated in *12 American Jurisprudence*, page 532, as follows:

> "An option must be fully and completely accepted in all its parts and its provisions strictly complied with before it becomes an executory contract."

At page 531, the same author says:

> "Similarly, if an offer has become inoperative because of the act of the offeree in doing something which amounts to a rejection of the offer, the latter cannot afterwards revive the proposal of the offerer by tendering an acceptance of it."

British-American was justified in treating Buffington and Smith's telegram as a rejection of the offer.

However, the type of drilling equipment to be used and the insistence of Buffington and Smith that the location of wells must be satisfactory to them was not the only point of controversy. The principal controversy related to the consideration to be paid for drilling. The stipulation merely

said that the wells should be drilled at the "prevailing contract price". The testimony of plaintiffs' witness Sindorf was to the effect that the contract price for drilling in the area in question ranged from $2.00 to $2.75 per foot. That, in addition to the twenty wells here in question contracted by British-American for $2.00 per foot, Luce & Ice contracted the drilling of certain of their wells for $2.00 per foot (R. 217).

Argument in Support of Point E.

According to the undisputed testimony of plaintiff Buffington there were two methods of determining the prevailing contract price in their field, one being through favoritism and the other being by competitive bidding (R. 208). Since British-American was able to obtain all the contracts for $2.00 per foot, we submit that that price was obtained through competitive bidding. Plaintiffs were certainly not entitled to charge a higher price than British-American had been able to obtain.

There appears to be a dearth of authority as to the meaning of "prevailing contract price" in a situation of this kind and where there is such a broad range in the prices paid for services as the proof shows existed in the oil field in question. In *People of the State of New York ex rel Wm. J. Rodgers* v. *Coler*, 166 N. Y. 1, the New York Court of Appeals wrestled with a statute which provided that wages for a certain class of work should not be less than the prevailing rate for a day's work in the same trade or occupation in the locality within the State where such work was done. Concurring in the holding of the Court that the term was too indefinite, Judge Landon made the following observations:

> "It is admitted that the contractor paid less than the prevailing rate of wages. No doubt that is true if the highest rate among the best workmen is the test. But what is the prevailing rate of wages? Is it the

rate that the best workmen, or the largest mass of workmen, or the average workmen can command? Does it depend upon ability? If so, of which grade? Or upon numbers? If so, is it the majority of all or of a class? And, if on a class of which class and why? What rights have those who do not come within the dominant class? Does it depend upon supply and demand? Upon fair competition? How can we tell? Must we not conclude that a statute which simply says "the prevailing rate of wages" is too indefinite in its meaning to be made the test or condition of a penalty or forfeiture? When a penal statute leaves doubtful the kind of act it denounces, the accused is entitled to the benefit of the doubt, and though he may not insist upon the doubt, the state, out of self-respect, should refrain from inflicting the penalty."

Beginning at page 15 of their brief, appellees Buffington and Smith cite certain authorities on this point, but we respectfully submit that an analysis of the authorities cited will show that they do not sustain Buffington and Smith's position in this case. They cite *Mickleson* v. *Gypsy Oil Company*, 238 Pac. 194. The contractual provision there construed reads as follows:

> "It is further agreed, and this assignment is made upon the express condition that I, the said D. D. Mickleson, am to have all the drilling for oil or gas to be done by the Gypsy Oil Company, its successors or assigns, upon the premises covered by the leases herein assigned by me, the said drilling to be done at *average* prices that are being paid for such work by the Prairie Oil and Gas Company, the Producers Oil Company, and other good substantial oil and gas companies, so long as I do the drilling in a good workmanlike manner."

It will be observed that the provision is radically different from the provision involved in this suit in that it provides that the consideration shall be the *average* price paid by certain oil companies in the field and thus provides a

key for the ascertainment of the contract price. While the question as to the sufficiency of the provision to sustain a suit for damages on account of its breach was expressly withdrawn by the parties, the court, by way of dictum, observed that it saw no reason why the plaintiff should not maintain an action for damages for lost profits, pointing out that the provision involved in the case under consideration differed materially from the one condemned in *Emery Brothers* v. *Mutual Benefit Oil Company,* 175 Pac. 211, cited and discussed in appellant British-American Oil Producing Company's brief.

Memphis Fur. Mfg. Co. v. *Weymss Fur. Co.,* 2 F. (2d) 429, is likewise cited. This was a purchase and sales contract where the order was accepted on the following basis:

> "Due to the uncertainty of manufacturing, this order is accepted *subject to prices in effect on shipping date,* and our ability to ship. Your valued order received and entered as above."

Holding that the written contract contained a key for determining the price, the court said:

> "The contract did not specifically state the price to be paid for the goods on delivery. To constitute a sale the price need not be definitely fixed at the time the sale is effected, *if the agreement contains express or implied provisions by which it may be rendered certain.* 23 R. C. L. 1278; Leutmeyer *v.* Murdock, 267 F. 158 (C. C. A.); Chenoweth Hardware Co. *v.* Gray, 104 Ala. 236, 15 So. 511, 53 Am. St. Rep. 37; McMahon *v.* Mayor, 22 App. Div. 133, 47 N. Y. 1018; McCann *v.* City of New York, 52 App. Div. 358, 65 N. Y. S. 308. Whether the price to be paid was the market price at the time of delivery, as claimed by defendant, or the price fixed by the plaintiff at the factory, as plaintiff asserts, *the date for determining the price was present and easily ascertainable.* Which of the contentions made is correct is immaterial, in view of the verdict

(hereafter to be considered) returned by the jury and the failure of the plaintiff to assail its action."

Royster Guano Company v. *Hall*, 68 F. (2d) 533, is also cited by appellees Buffington and Smith. That case was a suit by an injured employee who alleged that one of the terms of the settlement of his claim for damages on account of the injuries received by him was that he should be employed by defendant during the rest of his life. As to the terms of the employment, the court said:

> "The fair meaning of the promise was that defendant would furnish plaintiff employment so long as he might live *at the highest rate of wages which it paid for common labor*, with the implied provisos that he perform the work assigned him satisfactorily and that defendant continue in business."

Since the plaintiff was to be employed by the defendant, there was no difficulty in determining the rate of pay as it was the highest rate of wages paid by the defendant itself for common labor.

Argument in Support of Point F.

There was nothing in the contract giving the option (if any) indicating that it was the intention of the parties that plaintiffs, in handling the joint property, were to make a profit over their associates. The presumption of law, in the absence of express agreement, is against the right to make profits. We quote from *Vol. 20, R. C. L.*, page 877, as follows:

> "Right to Compensation.—The general rule is that a partner is not entitled to compensation for services in conducting the partnership business beyond his share of the profits unless there is a stipulation to that effect, and that he has no right by implication to claim anything extra by reason of any inequality of services ren-

dered by him, as compared with those rendered by his copartners. The reason for this rule lies in the fact that each partner, in taking care of the joint property, is practically taking care of his own interest and is but performing his own duties and obligations growing out of the partnership. Furthermore the relative value of the services rendered by the several partners of a firm cannot be estimated and equalized, for it is impossible to see how far the relative knowledge, skill and ability of each enter into the adjustment of the terms of the contract. The courts therefore usually decline to look into the question as to which partner has performed the more onerous duties or as to whether the one has been more skillful or more industrious than the other. And a partner is not entitled to claim compensation for his services in business without a special contract therefor, although he attends almost exclusively to the business, or even takes entire charge of it during the sickness or disability of his associates. This holds true in practically all cases wherein the partnership is a going concern with the partners all alive."

Again, under Joint Adventures, we quote from *Vol. 33, C. J.*, page 860, Sec. 65:

"Compensation for Services.—Unless the contract so provides, no member of a joint adventure is entitled to any compensation for services rendered by him toward the common enterprise, and the fact that one of them is appointed the manager thereof does not change the rule."

Also, under the head of Partnership, *Vol. 47, C. J.*, page 786, Sec. 230:

"Since each member of a partnership is under legal obligation, unless exempted therefrom by agreement, to devote his time and efforts to a reasonable extent to the partnership business, the general rule follows that, in the absence of an agreement therefor, a partner is not entitled to compensation, other than his share of the profits, for his services to the firm, however valuable

> they may be; and it is so provided by statute in a number of jurisdictions. A managing partner is generally held to be in no different position than any other with respect to the application of this rule and, similarly, a partner who does all the work for the firm business, or devotes all his time thereto, while his copartner does no work and devotes no time, has been denied compensation in the absence of agreement therefor."

In *Wilson* v. *Hunt*, 270 S. W. 263, it was held that one copartner was not entitled to recover, in addition to his share of profits, wages for labor in absence of stipulations therefor in the partnership agreement.

Certainly it was not within the contemplation of the parties that the enormous profits, which have been found by the jury, were within the contemplation of the defendant, J. J. Dorr. Nor can it reasonably be said that it was the intention of the parties that they would pay the plaintiffs $2.50 per foot for drilling the wells when they could have, and did obtain contracts for the drilling of them at $2.00 per foot, which was the price actually paid McCutcheon Drilling Company for drilling the twenty wells in controversy.

The last clause of the contract negatives any idea of profit. We quote: "It is further agreed that in the handling of this as a joint venture there is to be no expense as overhead charged on either side." Not only was it intended that neither of the parties was to profit at the expense of the others, but the overhead of the operating party was not to be estimated in determining the expense of the operation.

Argument in Support of Points G, H, I and J.

These points are closely related and will be discussed together. In his conclusions of law the District Judge expressed his view of the stipulation here involved and the nature of the lease contracts as follows:

> "The contract entered into by and between plaintiff Buffington and defendant Dorr on July 30, 1937, was

a valid and legal contract, and the provision therein reading as follows:

"'It is further understood and agreed that in the event said well is a producer, we are to have the preference of all future drilling operations, at the prevailing contract price', is a valid and legal provision" (R. 84).

• • • • • • •

"The provision in the contract sued on herein, if not a covenant running with the leases, is, at least a profit a prendre, or equitable servitude which attaches to such leases, the same being the subject matter thereof and the defendant, The British-American Oil Producing Company, having bought with notice and knowledge of such contract ought to be and is bound thereby.

"An oil and gas lease, though creating a determinable fee estate, *is in the nature of a lease, and not a deed* and the defendant, The British-American Oil Producing Company, having purchased its interest in such leases with notice and knowledge of such contract which related to such leases took subject thereto and is bound thereby" (R. 86).

It is respectfully submitted that the holding of the Circuit Court of Appeals, that the instruments of lease here involved are in the nature of a lease and the application of the law of landlord and tenant in determining the rights and liabilities of the parties, is in conflict with the decisions of the Texas courts, as well as prior decisions of this Court. Whatever may be the conception of such contracts in other States, the law is well settled by the Texas decisions that such instruments, though called leases, are conveyances of a determinable fee on common law limitations and are to be construed accordingly.

The right to use the surface is an incident to the grant in the nature of an easement. *Lemar* v. *Garner*, 121 Tex. 502, 50 S. W. (2d) 769.

In *Gordon* v. *Empire Gas & Fuel Company*, 63 F. (2d) 487, Judge Sibley, speaking for the Court of Civil Appeals, said:

> "It is now settled, though it was not then, that an agreement such as that before us is a *conveyance* on the conditions stated in it of an estate in the minerals in place in the soil, though they be fugitive oil and gas, rather than a mere right to use the land to capture them, and that, where the agreement extends to the exhaustion of the minerals, the estate is a base fee therein. Stephens County *v.* Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566; Waggoner Estate *v.* Sigley Oil Co., 118 Tex. 509, 19 S. W. (2d) 27. Furthermore, such agreements have in consequence been held to be *sales* within the constitutional and statutory provisions for the sale of the University lands. Theisen *v.* Robison, Commissioner, 117 Tex. 489, 8 S. W. (2d) 646."

To the cases cited by Judge Sibley, there may be added *Ehlinger, et al.* v. *Clark*, 117 Tex. 547, 8 S. W. (2d), page 666, where the Supreme Court of Texas had under consideration a lease contract similar to the original lease contracts here involved, executed by a county on certain of its school lands. The question was whether or not the transaction amounted to a *sale* and conveyance of the oil and gas within the meaning of the constitutional provision permitting the *sale* of county school lands by the Commissioners Courts. Upholding the contract as a sale, the Court, speaking through the late Chief Justice Cureton, said:

> "Under the contract, as we view it, the county parts with its title to all the minerals in place, and obtains a moneyed consideration of $4,000, and, in addition, the usual one-eighth royalty from the oil produced. That such a transaction *is a sale of the minerals in place* is the established law, we think, in this state."

Also:

> "The language of the contract that the county 'has granted, demised, leased, and let unto the said lessee for the sole and only purpose of mining and operating for oil and gas * * * all that certain tract of land', means plainly that an actual estate in the land, to-wit, the mineral estate, has been conveyed without reservation as to any part of it. Stephens County *v.* Mid-Kansas Oil & Gas Co., 113 Tex. 160, 254 S. W. 290, 29 A. L. R. 566."

The leases here involved are the modern "unless" except as a part of the consideration the lessee obligated himself to commence a test well on or before September 1, 1937, and drill it to a depth of 2500 feet unless oil or gas should be encountered in paying quantities at a lesser depth or unless water should be encountered in what is known as the Yates sand (R. 104-136). This is the test well for the drilling of which plaintiffs received $3,000 cash and a fourth interest in the lease on the section.

The Circuit Court of Appeals seems to have been influenced by the holding of the Fort Worth Court of Civil Appeals in *Pierce-Fordyce Oil Assn.* v. *Woodrum*, 188 S. W. 245, relied on by the plaintiffs. In the *Woodrum* case the lease contract was of the old "drill or pay" type by which the lessee was obligated absolutely to begin operations for the drilling of a well upon the leased premises within six months from the date of the lease, or thereafter pay to the lessor as rental 50 cents per acre each month that drilling was deferred. Upon payment of $1.00 the lessee had the right to surrender the lease and be released and discharged from further payments. In the event of such surrender the fact was to be evidenced by a deed of surrender duly executed by the lessee and mailed to the lessor. The lease also provided that all covenants and agreements therein contained should *extend to the respective heirs, legal repre-*

sentatives and assigns of the parties. The thing was *in esse* and the lease used the word "assign", hence fulfilled the requirement of the rule in *Spencer's* case. The Pierce-Fordyce Oil Association, by assignment, acquired the interest of the original lessee and held the lease for a considerable period of time without drilling a well or paying the prescribed rental. When sued for accrued rents the Association defended on the grounds that the obligations of the lessee were not binding upon the assignee. On original submission the court held that the Association was not liable for the stipulated rental, but on rehearing held that the agreement to pay rental was a covenant running with the land and since the Association did not avail itself of the privilege of surrendering the lease, it was bound to pay the rental. We have no fault to find with that decision applied to the facts there under consideration. It has no application here. There is a radical difference between the "drill or pay" type of lease and the modern form known as the "unless" lease. *34 Texas Jurisprudence,* pp. 741-745. The enjoyment of the estate created by the Woodrum lease carried with it the correlative duty and obligation to pay rent as does a lease on an ordinary store building. The Oil Association used and enjoyed the estate and was bound to pay the stipulated rental. There was "privity of estate" as to the whole of the leasehold estate.

In other words, in the cited case there was an absolute obligation in the lease contract to pay rental as a consideration for the use of the leased property which plainly was a covenant running with the lease. There was privity of estate growing out of the use and enjoyment of the leased premises, the same as if the property covered by the lease had been farm land or a building used and occupied by the assignee of the lease. In the case at bar the covenant is purely personal and collateral and the enjoyment and use of the leasehold estate is in no respect conditioned upon

compliance with the stipulation. The law of landlord and tenant manifestly has no application.

Mound Valley Vitrified Brick Co. v. *Mound Valley Gas & Oil Co.*, 268 Fed. 936, was a suit for damages growing out of the breach of a contractual covenant by which the Development Company agreed to furnish gas to the Brick Company from wells located upon the Development Company's lease in Labette County, Kansas. The Development Company assigned its rights to the Gas Company. The Gas Company furnished gas for awhile then terminated the contract. The Brick Company sued the Development Company and the Gas Company at law for breach of contract. The court held that the covenant was a personal one and did not bind the assignee. Differentiating the case from landlord and tenant cases the court said:

> "While it is undoubtedly true as contended by counsel for plaintiff, one who accepts an assignment of a lease of real property with the consent of the landlord, or enters into possession thereunder, becomes liable to the landlord for payment of the rent reserved in the lease, and while he continues as such assignee of the lease for breach of its covenant to pay rent the landlord may charge the original lessee on the ground of privity of contract and the sublessee or assignee of the lease on the doctrine of privity of estate. Washington Natural Gas Co. *v.* Johnson, 123 Pa. 576, 16 Atl. 799, 10 Am. St. Rep. 553; Schumucker *v.* Sibert, 18 Kan. 104, 26 Am. Rep. 765; Woodland Oil Co. *v.* Crawford, 55 Ohio St. 171, 44 N. E. 1093, 34 L. R. A. 62; Hogg *v.* Reynolds, 61 Neb. 758, 86 N. W. 479, 87 Am. St. Rep. 522.
>
> "Yet all covenants of parties to a contract are either real or personal, depending on the subject matter of the contract. All contracts of conveyance of real property and all other contracts so closely connected with real property that the benefits or burdens of such contract pass by a conveyance of the property itself are what is termed in the law covenants real. All other covenants or agreements of parties in the nature of covenants in their contracts are personal. Thus the

covenant in a lease to pay rent reserved is a covenant which runs with the possession of the land, and for this reason when the lease is assigned the covenants being for the benefit of the land, and being for the payment of that which arises out of the use and enjoyment of the land, follows the property in the hands of the assignee and binds him to the payment of all rents accruing while he enjoys its possession. In other words, by the very act of assignment of such a contract and its acceptance by the assignee, the privity in estate created between the landlord and the original lessee by the lease passes out of the original lessee into the assignee for the reason that thereby a right in or to the land itself passes. However, as has been seen, the contract here in controversy has no relation whatever to real estate or any right thereto, or title or interest therein, and the covenants or agreements of the parties contained in this contract are therefore purely personal. An action on a personal covenant or agreement will not lie in favor of a person not a party to it, and as a general rule, only the covenantor, his executors and administrators are bound by such personal covenants. Heirs at law are bound when expressly named in the contract. Assignees are not bound at law, although they may be named, but in certain instances they may be charged in equity."

In the case at bar the court did not determine whether the contractual stipulation in question is a covenant running with the lease—the land—a profit a prendre or an equitable servitude which attaches to such leases, but was quite certain it is one or the other and binding on the British-American Oil Producing Company, assignee of an interest in the leases by reason of its purchase of such interest.

Thuss, in his work on the *Texas Law of Oil and Gas*, speaking of profits a prendre, says, page 128:

> "Such a theory would do violence to many of the well settled principles pertaining to oil and gas in Texas."

The theory has been applied in States like Oklahoma where an oil and gas lease is held not to convey an interest in the land but merely to confer upon the lessee an option or privilege to develop the mineral resources of the land and remove the oil and gas. The doctrine might well be applied in such jurisdictions as the optional right or privilege to remove oil or gas fits the general definitions of profits a prendre. In *19 Corpus Juris*, page 870, the author defines the term as follows:

> "Profits a Prendre—1. Nature of Right. The rights to profits, denominated profits a prendre, consists of a right to take a part of the soil or produce of the land, in which there is a supposable value. * * *
>
> "Illustrations. The right to enter upon the land of another for any of the following reasons has been held to be a profit a prendre: To cut grass; to depasture the land; to dig gravel; to keep a mill in repair; to fish in an unnavigable stream; to mine metals generally; to search for and dig coal; to shoot over the land and take game or wild fowl; to take away drifting sand from the beach, or seawood thrown upon the shore; to take driftwood; to take ice; to take iron ore from the land; and to take timber from the land."

The stipulation here involved gave plaintiffs no right to take any of the oil or gas discovered and is clearly not a profit a prendre. Nor is said stipulation a covenant that runs with the land. With respect to such contracts, *Mills & Willingham* in their work on the *Law of Oil and Gas* (page 233) say:

> "Drilling contracts for a money consideration *do not run with the land*, but some drilling contracts create a legal or equitable interest in the lease * * *
>
> "On principle obligations of a drilling contract run with the land *only* when they serve to create a legal or equitable interest therein."

Such covenants run with the land where the driller is to receive a definite portion of the production as a consideration for his services. Otherwise, when the consideration is payable in cash.

The text is in accord with the decision of *Emerson et al.* v. *Little Six Oil Co.*, 3 F. (2d) 256.

Of the Texas rule with respect to covenants, *12 Texas Jurisprudence*, page 51, says:

> "As regards the distinction between personal and real covenants, it has been said that those covenants which are held to run with the land and inure to the benefit of the assignee are such as generally affect the land itself and confer a benefit on the grantor."

As to the rule in *Spencer's* case and the adherence of the Texas courts to that rule, the same author, at page 53, makes these observations:

> "In Spencer's Case (4 Coke, 16, 1 Smith's Lead. Cas., 9th Am. Ed. 174) a leading authority upon this subject, the rule was laid down that, if the covenant extends to a thing in esse, parcel of the demise, annexed and appurtenant to the thing demised, it shall go with the land and shall bind the assignee, although he be not bound by express words, but that if the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which has no being. It has been observed that there appears to be considerable contrariety of opinion on the part of the courts as to whether or not a covenant concerning a thing not in esse at the time of the demise runs with the land without the use of the word 'assigns'. And, on account of the inconsistency between the 'first and second resolutions' in Spencer's Case, the courts have of late been trying to break away from the old rule that the use of the word 'assigns' is necessary to give the covenant the effect of one running with the land, by declaring that the intention of the parties as gathered from the entire instrument is

the controlling factor, rather than the mere inclusion or omission of the technical words. The authorities are as yet fairly evenly divided, however, and in Texas the court, although viewing the new tendency with favor, has felt itself bound by earlier decisions settling the question in favor of the rule as announced in Spencer's Case. For example, if the covenant be to set up and erect a new house, and the like, it will not, under the rule in Spencer's case, supra, bind the assignee unless they are named in the covenant. Similarly, a covenant by a vendor to furnish sewerage, water, electric lights and free transportation has been declared not to run with the land, it being manifest that it was not intended to confer any benefit upon the grantor and that it does not relate to a thing in esse."

In *G. C. & S. F. Ry. Co.* v. *Smith*, 72 Tex. 122, 9 S. W. 865, a vendee of certain land adjoining the Railway Company's right-of-way sought to enforce a stipulation in the deed from his remote grantor to the Railway Company to the effect that, under certain conditions the Railway Company should keep its right-of-way under fence. Holding that the covenant did not run with the land, the court said:

"There has been much discussion in the cases turning upon this point, 'concerning express covenants and covenants in law; and which covenants run with the land, and which of them are collateral, and do not go with the land; and where the assignee shall be bound without naming him, and where not'. In Spencer's Case, 3 Coke, 31, which is recognized as the leading authority upon this subject, the rule is said to be that, when the covenant extends to a thing in esse, part of the demise, the thing to be done by force of the covenant is annexed and appurtenant to the thing demised, and shall go with the land, and bind the assignee, though he be not bound by express words; but, when the covenant extends to a thing which is not in being at the time of the demise made, it cannot be appurtenant or annexed to the thing which has no being.' If

the covenant be to erect or set up a new house and the like, it will not bind the assignees unless they be named in the covenant. Tallman *v.* Coffin, 4 N. Y. 136; Trustees *v.* Cowen, 4 Paige, 510; Barrow *v.* Richard, 8 Paige, 351. Those covenants which are held to run with the land, and inure to the benefit of the assignee, are such as generally affected the land itself, and conferred a benefit on the grantor. In the case before us, the rule announced in the authorities cited above would apply with additional force from the fact that it appears from the language of the contract or covenant that it was intended to protect stock from injury by the railroad, rather than confer a benefit upon the grantor, affecting the land itself. It was contingent, and necessarily temporary in its application. To construe this contract as a covenant running with the land, and the breach of which would authorize the action in this case, would be an extension of the rule beyond the limits already clearly established in the cases cited."

In *Lakewood Heights Company* v. *McCuistion*, 226 S. W. 1109, the court, following *Railway Company* v. *Smith*, *supra*, held that a contract to furnish sewerage, water, electric lights and free transportation to a car line in the City of Dallas collateral to a contract of purchase and sale of a lot, was a personal covenant and one that did not run with the land.

The court points out that while there seems to be quite a contrariety of opinion as to whether or not a covenant concerning a thing not in esse at the time of the demise runs with the land without the use of the word "assigns", the Supreme Court of Texas has settled the law of this State in harmony with the rule announced in Spencer's case that in such a situation the covenant is personal and does not run with the land. Here the thing was not in esse at the time of the letter agreement and the covenant, if it rises to the dignity of a covenant, does not purport to run in favor of an assignee, or bind an assignee.

Montgomery et al. v. *Craeger* (Tex. Civ. App.), 22 S. W. (2d) 463, is in our opinion directly in point. Montgomery and Craeger were partners in the business of buying and selling gasoline, motor oil and automobile accessories at Mineral Wells, Texas. The partnership was dissolved. Craeger conveyed to Montgomery what was known as the Park Filling Station, and Montgomery agreed to purchase all gasoline sold by him at said station from Craeger. Montgomery sold the filling station to W. A. Ford while the contract between Montgomery and Craeger was in force, and Craeger filed suit against Montgomery and Ford to enjoin a breach of the contract and to recover lost profits. In the District Court final judgment was rendered enjoining any further breach of the contract and awarding to Craeger damages for lost profits amounting to $630.00. Reversing the judgment in so far as it granted plaintiff any relief against Ford, the assignee of Montgomery, the court said:

> "In the case at bar we construe the contract to declare an unrestricted right on the part of Montgomery to sell filling station, save only in the sense that there may be a restriction in the obligation of Montgomery to impose upon the purchaser the obligations of the contract. Having sold to Ford, without obligating Ford to carry out the contract, a case is presented of a breach of contract by Montgomery only."

With respect to the equitable relief sought, the Court held as follows:

> "It is true that equity recognizes a kind of covenants which do not run with the land, but are nevertheless binding upon subsequent owners of property who acquire same with notice. Pomeroy's Equity, Sections 1295, 698. But even that kind of covenant 'must * * * relate to or concern the land or its use or enjoyment. *It is not enough that (such) a covenant affects the use of land or the enjoyment of an easement therein* * * *

in a collateral way.' Kettle River Ry. Co. *v.* Eastern Ry. Co., 41 Minn. 461, 43 N. W. 469, 475, 6 L. R. A. 111; West Virginia Transp. Co. *v.* Ohio River Pipe Line Co., 22 W. Va. 600, 46 Am. Rep. 527. In the first case it was held that an agreement by a landowner that the products of the land be transported exclusively by one company does not so relate to the land as to be binding on purchaser with notice. Such we think is the nature of the agreement we are now considering."

In the instant case the Circuit Court of Appeals indicates that the contractual provision under consideration may impose an "equitable servitude" upon the leases in question. It is significant, however, that they granted no equitable relief to the plaintiffs nor treated plaintiffs' suit otherwise than an action for damage. There are probably two reasons for such action. First, the contractual provision is too indefinite and uncertain to support a decree of specific performance by injunction or otherwise. The specific enforcement of the contract would place upon the Court the duty of making a contract for the parties and agreeing for them upon terms not covered by the contract they made. In the second place, the plaintiff suggested no basis for the interposition of a court of equity. They expended nothing on faith of the provision.

The law in Texas, as elsewhere, is that in a proper case the court may impose an equitable servitude upon property where the covenant *directly* affects the property, but in such cases the relief is equitable by way of specific performance or injunction, and not damages. In the recent case of *Everett Factories & Terminal Corp.* v. *Oldetyme Distillers Corp.*, 15 N. E. (2d) 829, the Supreme Court of Massachusetts said:

"Moreover, even if, as in the usual case of a restrictive servitude, the defendant could be enjoined from using the premises in a manner inconsistent with the

> equitable servitude, that is without making the stipulated payments, the amount of such payments cannot be recovered from the defendant personally as damages for use of the premises in such inconsistent manner. Compare Whitney *v.* Union Railway Co., 11 Gray, 359, 71 Am. Dec. 715; Childs *v.* Boston & Maine Ry., 213 Mass. 91, 95, 99 N. E. 957, 48 L. R. A. (N. S.) 378. *The obligation resting upon the land cannot be transformed into a personal obligation of the defendant in either of these ways.*"

Suppose the Court in this case would undertake to enforce the stipulation in question by a decree to that effect or by injunction. What conditions or terms would they impose? Of course, in a proper case, a court of equity may impose an "equitable servitude" upon property,—but may not award damages.

Graham v. *Omar Gasoline Company*, 253 S. W. 896, is a Texas case where equitable relief was held to be proper. Omar Gasoline Company and the Sioux Oil & Refining Company entered into a contract by which the Gasoline Company agreed to buy and the Refining Company agreed to sell all casinghead gas and other gas produced from wells upon a tract of land particularly described in the contract. It was alleged that in performance of said contract the Gasoline Company had entered upon the land and at great expense had installed gas lines and meters for the purpose of taking and receiving the gas; that the contract of purchase and sale was of record when Graham bought the lease and was binding on him. The contract was definite and certain in its terms, vested an interest in the lease and was in all respects susceptible of specific performance. The Court held that it was a case appropriate for equitable relief.

In the instant case the contract is unilateral, is indefinite and uncertain and it is not contended that plaintiffs have

expended five cents in its performance. For the drilling of the original test well, plaintiffs were paid $3,000 cash and received an assignment of an undivided one-fourth interest in an oil and gas lease covering approximately a section of land upon which some twenty-five producing wells had been drilled prior to the date of the trial. From these wells they had received approximately $10,000 to the date of the trial. (R. 207).

American Refining Company et al. v. *Tide Water Oil* Corp., 264 S. W. 335, is another Texas case where equitable relief was granted. There was a contract entered into under which the lease owner agreed to sell and the Oil Company agreed to buy all casinghead gas produced upon a tract of land in the contract described. It was alleged that upon faith of the contract, properties had been constructed at an expense of $1,500,000. The contract was definite and certain and the conclusion of the court was that the purchaser acquired ownership not only of the gas as it might naturally arise and be caught in the casingheads, but also to all the gas *in place*. Under the circumstances and in view of the superior equities of the plaintiff, the court held that equitable relief should be granted.

The same rule obtains in the Federal Court. *Southwest Pipe Line Co.* v. *Empire Natural Gas Co.*, 8 Cir., 33 F. (2d) 248, is similar to and cites the two Texas cases just discussed. There the lease owner agreed to sell and the Gas Company agreed to purchase all the merchantable gas produced from wells then existing or which might thereafter be drilled upon a definitely described tract of land. On the faith of the contract and to take and handle the gas, and to create a market therefor, the purchaser spent $160,000 on pipe lines and other equipment. The lease was sold and the purchaser proposed to disconnect the Gas Company's lines and sell the gas to another. The Court held that the contract gave the purchaser a vested interest in the leasehold estate

not only binding on the lessee, but his assignee as well; that the equities of the case were with the plaintiff and that the relief prayed should be granted.

Joy v. *City of St. Louis*, 138 U. S. 1, illustrates the point from another angle—the interest of the public in the contract. In the Joy case the controversy involved a contract for the joint use of railroad tracks through Forest Park into the Union Station at St. Louis. The franchise granting the right to operate through the park provided that other railroad companies would be permitted to use the tracks. We quote from this case:

> "This is to be done 'under such reasonable regulations and terms as may be agreed upon', and 'upon such terms and for such fair and equitable compensation to be paid' to the County Company 'therefor as may be agreed upon by such companies' ".

With reference to the contract in question, the Court said:

> "The covenant in paragraph 9 of the tripartite agreement created an easement in the property of the County Company and the Kansas City Company for the benefit of the public, which might be availed of, with the consent of the public authorities, properly expressed, by other railroad companies which might wish to use not only the right of way through the park but also that between the park and the Union Depot.
>
> * * * * * * *
>
> "Contracts of such character are to be construed liberally in favor of the public when the subject matter concerns the interests of the public."

The assignee of the original holder of the franchise and a new railway company got at loggerhead over the use of the tracks through the park and could not or would not agree

upon compensation for the use. The Supreme Court held that the privilege accorded to other railway companies to use the trackage was a covenant that ran with the franchise and that the Court, to prevent useless railroad tracks through the park and along the streets of the city, and in keeping with the purpose and spirit of the agreement, would specifically enforce the contract and "fix a fair and equitable" consideration for the use of the tracks and facilities involved.

The public has no interest in the contract involved here.

Argument in Support of Points K and L.

Plaintiff pleaded that the effect of the lease sued on was to create a mining partnership. While the District Judge, in his findings and conclusions, emphasized the existence of a partnership relation, he apparently ignored that relationship in his determination of the case. If the letter in question created a mining partnership and if the provision therein contained in reference to the drilling of future wells is legal and binding, any obligation flowing from such provision would be a partnership obligation and not that of one or more of the partners. In no event is there a basis for the character of suit that is being here prosecuted or the judgment rendered.

In the note appended to *Martin* v. *McBryde*, 21 A. L. R. 12, at page 34, the annotator said:

> "The almost, if not universally accepted general rule is to the effect that, in the absence of statutory permission, or express promise, or fraud, an action ex contractu at law, as distinguished from an action in equity, is not maintainable between partners with respect to partnership transactions, unless there has been an accounting or settlement of the partnership affairs."

The statement is supported by numerous citations, State and Federal, including cases from Texas.

In *47 Corpus Juris*, page 804, the author, discussing the rule and pointing out the anomalous situation that would exist if one partner were permitted to sue another partner at law on a *partnership obligation*, said:

> "In partnership transactions a partner does not as a rule become the creditor of the debtor of a copartner, but of the firm. Such a suit would necessitate that the party complained of be both plaintiff and defendant."

In *Crow* v. *Green*, 111 Pa. 637, 5 Atl. 23, where the alleged breach was of a contract to purchase certain property from the plaintiff partner, the court said:

> "The contract was for the purchase of property to be used for the purpose of the company or partnership. The business to be carried on upon the premises was a joint or partnership business. Upon the theory of a partnership the plaintiff was certainly liable to contribute in proportion to the extent of his interest, to whatever funds were required for the uses of the partnership. If the firm owed debts, we know of no reason why he should not ratably contribute to their liquidation. On the other hand, if they realized profits, it is equally certain he would be entitled to his proportionate share. The theory upon which the action is based is that there was an actual partnership in legal effect, and without that theory, of course, there could be no recovery. But if there was a partnership, we find nothing in this record to show that the ordinary law of partnership is inapplicable to the relations of these parties to each other. The obligation to share losses as well as gains, to contribute jointly with the others to the funds requisite to meet the liabilities of the partnership, is one of the most important and fundamental duties of the relation. This being so, we cannot understand why, if a recovery is had in this action, the plaintiff should not be required to contribute to the payment of the money recovered * * * Suppose, then, a right of recovery be conceded in this case, for what amount shall the verdict be rendered?

If for the whole amount of the contract price, most certainly the defendants could file a bill against the plaintiff to compel him to contribute his proportion. But why should these defendants, who are a part only of the members of the partnership, pay to the plaintiff, who is also a member, the whole of a debt for the payment of which he is jointly liable with them? Such a result would certainly be inequitable, and contrary to every principle and precedent in the law of partnership. If, on the other hand, the verdict should be rendered only for such proportions of the whole amount of the purchase money as the defendants ought to pay, what is the amount of that proportion? That, of course, would depend upon the adjustment of partnership accounts * * * There never was a contract by which these particular defendants agreed to pay to this particular plaintiff any sum of money whatever, for any purpose. Their liability as individuals to make any such payment is a derivative liability, resulting from a joint relation with the plaintiff, which imposes the same liability upon him. It is not necessary to enlarge upon this subject. The case comes within the perfectly familiar rule that one partner cannot sue another partner for a partnership transaction except by bill in equity or action of account render."

While the new Rules for Civil Procedure provide for one court, with jurisdiction at law and in equity, they do not abolish the distinction between law and equity. In Texas we have had the blended system from time immemorial, but the Texas courts have adhered to the rule universally recognized in suits of this character. See cases cited in 121 S. W. (2d) 384.

Hardee v. *Adams Oil Assn.*, 254 S. W. 602 (T. C. A.), is directly in point. Denying the right of one partner to prosecute a suit at law against his copartners, the court said:

"If the declaration of trust had contained no provision exempting the shareholders from personal liabil-

ity for the debts of the association, appellant being a member of the association, it seems to be settled that she could not maintain a suit against her copartners or comembers of the association on a cause of action growing out of a partnership transaction until there had been an accounting and settlement of the partnership affairs.

"In Wrighton on Unincorporated Associations at pages 102, 103, it is said:

" 'One member cannot sue another member on a firm transaction at law unless there has been an accounting fixing the amount due, or the transaction has otherwise been severed from the mutual obligation of the members.'

"In Cyc., Vol. 23, p. 472, the rule is set out as follows:

" 'While an action at law cannot be maintained by one member of a joint-stock association against other members of the same association in respect to their mutual rights and liabilities as such members, yet he may betake himself to a co-ordinate forum and file a bill in equity for the adjustment of their rights and have an accounting if justice requires it.'

"This rule has been recognized and followed by the courts of this state: Merriwether *v.* Hardeman, 51 Tex. 436; Lockhart *v.* Lytle, 47 Tex. 453; Worley *v.* Smith, 26 Tex. Civ. App. 270, 63 S. W. 903.

"In the following cases this rule as to partnership and joint-stock companies is held to be identical: Laney *v.* Fickel, 83 Mo. App. 60; Whitehouse *v.* Sprague (Me.), 7 Atl. 17."

The *Hardee* case was cited with approval and followed in *Brodage* v. *Greenwood*, 261 S. W. 453 (Tex. Com. App.), where a state of facts very similar to the facts of this case was involved. Brodage drilled a well for a syndicate—a partnership—of which he was a member. He sued his copartners for the contract price of the well. Holding that

he could not maintain such suit on a partnership obligation, the court said:

> "If Brodage had an interest in the lease and the contract was as appellees contend, then the appellant could not recover anything in this suit, even though he and Ard and the 'crowd' to whom the amount due on the drilling contract should be credited were not indebted to the Logan Syndicate for the full amount that they would be entitled to for the drilling; in such case, the plaintiff would have a claim against the partnership for such balance, which he could assert *only in accounting* to the partnership. Hardee *v.* Adams Oil Association (Tex. Civ. App.), 254 S. W. 605."

There is an added reason why a suit for accounting was the only available remedy in the instant case. Here the proof shows that during the time with the capital and equipment plaintiffs would have used on the Dorr lease, they engaged in other drilling operations for which they were compensated either in cash or by an interest in a lease (R. 185-190). It was their duty to minimize their damage and account for any profits made by them during the time they would have been engaged upon the Dorr lease. An accounting suit was the only proper proceeding for an adjustment of the rights of the parties.

Plaintiff Buffington testified that subsequent to the alleged breach of contract in question, and during the period he and his partner Smith would have been engaged in drilling wells on the Dorr lease, they drilled wells on other property. The first well was drilled in Scurry County (R. 185). They were interested in drilling the Emory Well in Ward County, for which they received a three-eighths interest in the lease on one tract consisting of eighty acres, and two other tracts consisting of forty acres each. The Emory well was a producer (R. 186-187). They drilled two wells on what is known as the Samuels property, one of

which wells was junked, but the second well was completed (R. 187-189). They took over and completed another well known as Archenhold No. 1, completed in August, 1939 (R. 189-190).

Defendants' counsel endeavored to show by plaintiff Buffington what profits were made by him and Smith on these operations, but was not able to elicit the proof, though the facts were peculiarly within their knowledge.

It appearing that the plaintiffs utilized their time, capital and equipment in other work, and that the information with respect to profits, if any, derived therefrom was peculiarly within the knowledge of plaintiffs, the burden rested upon them to make disclosure of the facts in order that appropriate credit might be allowed therefor in their claim for damages in this suit.

Ordinarily the burden rests upon the defendant to prove that the plaintiff might, by the use of reasonable diligence, have minimized the damage and the extent to which he might have done so. That rule does not apply, however, where the facts are peculiarly within the knowledge of the plaintiff.

> "It is a principle of law, when a particular fact necessary to be proved rests peculiarly within the knowledge of one of the parties, upon him rests the burden of proof." *Anthony* v. *American Railway Express Company*, 124 S. E. 753.

This rule has found favor in the Federal Courts. *Railway Co.* v. *United States*, 139 U. S. 560; *United States* v. *D. & R. G. R. Co.*, 191 U. S. 84.

The rules applies with peculiar force here. Plaintiffs allege that they and the defendants were and are partners. That relationship required of plaintiffs the utmost frankness and candor. It required that they disclose the profits made by them by the use of time, money and equipment

which they admit would have been necessary to carry on a drilling campaign on the Dorr lease. If they would have made money by the drilling of the wells on the Dorr lease, it is a reasonable assumption that they made profits out of the drilling done by them on other leases. They admit that by such drilling they acquired a three-eighths interest in a producing lease in Ward County. It is not inconceivable this profit may exceed the loss which they claim to have sustained on account of their failure to drill wells on the Dorr lease. In such a situation they have failed to prove their case. *Barron G. Collier, Inc.* v. *Peters Bros., Inc.* (*Tex. Civ. App.*), 124 S. W. (2d) 904; *Mount Ida School for Girls, Inc.* v. *Rood*, 253 Mich. 482, 235 N. W. 227, and *Russman* v. *Blount*, 104 F. (2d) 877.

Respectfully submitted,

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